

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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BEAU EZEKIEL BROWN,

Case No. 2:11-cv-00790-KJD-NJK

Petitioner,

## ORDER

V.

ISIDRO BACA, *et al.*,

## Respondents.

16 This case is – or, rather, was – a petition for a writ of habeas corpus, pursuant to  
17 28 U.S.C. § 2254, by Beau Ezekiel Brown, a Nevada prisoner. Brown is serving two  
18 consecutive sentences of life in prison, without the possibility of parole, on a conviction of  
19 first degree murder with use of a firearm. This Court appointed the Federal Public  
20 Defender for the District of Nevada (FPD) as counsel for Brown (ECF Nos. 7, 10), and  
21 this action was litigated to its conclusion, on Brown’s behalf, by his counsel.

22 On August 29, 2017, the Court denied Brown's amended habeas petition and  
23 denied Brown a certificate of appealability, and judgment was entered. See Order entered  
24 August 29, 2017 (ECF No. 58); Judgment (ECF No. 59). Brown appealed, and sought a  
25 certificate of appealability in the Ninth Circuit Court of Appeals. See Notice of Appeal  
26 (ECF No. 60). The court of appeals denied Brown's request for a certificate of  
27 appealability on January 31, 2018 (ECF No. 62). On February 22, 2018, the court of  
28 appeals granted the FPD's motion to withdraw from their representation of Brown, and

1 granted Brown's *pro se* motion for an extension of time to file a motion for reconsideration  
2 (ECF No. 65). According to Brown, he filed a motion for reconsideration in the court of  
3 appeals on March 26, 2018, and that motion was denied on April 20, 2018. See Motion  
4 to Reopen Case and Motion for Reconsideration (ECF Nos. 66, 67), p. 3.

5 On May 14, 2018, Brown filed, in this Court, a Motion to Reopen Case and Motion  
6 for Reconsideration (ECF Nos. 66, 67). In his motion, Brown asserts that there are three  
7 claims of ineffective assistance of counsel that were not included in his petition in this  
8 case, apparently, in his view, because of inadvertence, oversight, mistake or neglect on  
9 the part of his counsel; he characterizes those omitted claims as follows:

10 - "Counsel's failure to authenticate the excerpt video under  
11 NRS 52.015 Best Evidence Rule and object to prosecutorial misconduct fell  
below the standard of reasonable effective counsel."

12 - "Counsel's ineffectiveness in her choice of expert fell below  
13 the standard of reasonable effective counsel."

14 - "Counsel was ineffective for eliciting damaging identification  
15 testimony from a State's witness that undermined the theory of defense."

16 Motion to Reopen Case and Motion for Reconsideration (ECF Nos. 66, 67), pp. 5-6. As  
17 the Court understands Brown's motion, he requests that this case be reopened and the  
18 judgment vacated, such that those new claims may be added to his petition and  
19 adjudicated. As such, Brown's motion is in the nature of a motion for relief from judgment,  
20 pursuant to Federal Rule of Civil Procedure 60(b).

21 Rule 60(b) applies in habeas corpus actions, but only in conformity with the  
22 provisions of the Antiterrorism and Effective Death Penalty Act ("AEDPA"), including the  
23 limits on successive federal petitions set forth at 28 U.S.C. § 2244(b). See *Gonzalez v.*  
24 *Crosby*, 545 U.S. 524, 529 (2005). If a Rule 60(b) motion seeks to add a new ground for  
25 relief, it is, in substance, a successive habeas petition subject to the requirements of  
26 section 2244(b). *Id.* at 531; see also *United States v. Buenrostro*, 638 F.3d 720, 722 (9th  
27 Cir. 2011) ("[S]tate prisoner may not rely on Rule 60(b) to raise a new claim in federal  
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1       habeas proceedings that would otherwise be barred as second or successive under §  
2       2254.”).

3           AEDPA generally limits a petitioner to one federal habeas corpus action, and  
4       precludes a second or successive habeas petition unless certain requirements are met.  
5       See *Jones v. Ryan*, 733 F.3d 825, 834 (9th Cir. 2013); 28 U.S.C. § 2244(b). Before  
6       bringing a second or successive petition in the district court, the petitioner is required to  
7       obtain from the court of appeals “an order authorizing the district court to consider the  
8       [second or successive petition.]” See 28 U.S.C. § 2244(b)(3)(A).

9           There is no “bright-line rule for distinguishing between a bona fide Rule 60(b)  
10       motion and a disguised second or successive [habeas petition].” *Jones*, 733 F.3d at 834  
11       (quoting *United States v. Washington*, 653 F.3d 1057, 1060 (2011)). However, in  
12       *Gonzalez*, the Supreme Court provided guidance that is pertinent to the motion before  
13       this Court. A Rule 60(b) motion is proper where it “attacks … some defect in the integrity  
14       of the federal habeas proceedings,” while a disguised successive habeas petition is a  
15       filing that “contains one or more claims, defined as asserted federal bas[e]s for relief from  
16       a state court’s judgment of conviction.” *Gonzalez*, 545 U.S. at 530 (internal quotation  
17       marks omitted). The *Gonzalez* Court specifically instructed that a Rule 60(b) motion is, in  
18       substance, a successive petition, subject to section 2244(b), if it asserts that, because of  
19       “excusable neglect,” the prior federal petition omitted a claim of constitutional error, and  
20       seeks leave to present that claim. See *Gonzalez*, 545 U.S. at 531 (citing *Harris v. United*  
21       *States*, 367 F.3d 74, 80-81 (2nd Cir. 2004) (Rule 60(b) motion sought relief from judgment  
22       because counsel failed to raise a Sixth Amendment claim). That is the case here. Brown  
23       contends that, on account of failures of his counsel, three claims were left out of his  
24       petition, and he moves for relief from the judgment so that he can present those claims.

25           Brown’s motion is subject to the requirements of 28 U.S.C. § 2244(b). Brown  
26       makes no allegation, or showing, that he has obtained, from the Ninth Circuit Court of  
27       Appeals, an order authorizing a second or successive habeas petition.

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1                   **IT IS THEREFORE ORDERED** that petitioner's Motion to Reopen Case (ECF No.  
2 66) and Motion for Reconsideration (ECF No. 67) are **DENIED**.  
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4                   DATED THIS 17 day of May, 2018.  
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7                   KENT J. DAWSON,  
8                   CHIEF UNITED STATES DISTRICT JUDGE  
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